Sumardey bin Hj Jaidin v Public Prosecutor

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COURT OF APPEAL (BRUNEI DARUSSALAM) — CRIMINAL APPEAL NO 5 OF 2010
MORTIMER PCA, DAVIES AND ROGERS JJCA
17 MAY 2010

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Criminal Law — Penal Code (Brunei) — s 376(1), (2) — Sentence — One count of aggravated rape and three counts of rape — Young victims — Accused pleading guilty to crimes — Young accused — No antecedents — Consideration of public interest — Adequate sentence — Penal Code (Brunei) s 376(1) & (2)

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Criminal Procedure — Sentence — Appeal against sentence — One count of aggravated rape and three counts of rape — Young victims — Accused pleading guilty to crimes — Young accused — No antecedents — Consideration of public interest — Whether 20 years' imprisonment manifestly excessive

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Criminal Procedure — Sentencing — Mitigating factors — Youth of offender — Clear record of offender — Immediate confession to crimes

F

Criminal Procedure — Sentencing — Principles — Totality principle — Assessment of sentences for a series of offences after pleas of guilty — Whether total sentences that could be imposed after trial ought to be considered

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The accused had pleaded guilty to four counts of rape in the High Court. The first count concerned aggravated rape under s 376(2) of the Penal Code (Brunei) ('Code'). The remaining three counts were of rape contrary to s 376(1) of the Code. The judge passed sentences of ten years' imprisonment and 12 strokes of the cane on each of the first and second counts, and eight years imprisonment' with four strokes on each of the third and fourth counts. The sentences on the first and second counts were ordered to run concurrently making a total ten years' imprisonment. On the third and fourth counts, five years' imprisonment on each was ordered to run consecutive to each other and consecutive with the sentence on the first and second counts. The total imprisonment sentence imposed was 20 years. All the strokes of the cane were made non-cumulative totaling 12 in all. The trial judge was of the view that the facts of the case clearly showed that the accused was a dangerous serial rapist who preyed on naive young women and that the overriding consideration of the court must be in the public interest. Women had to be protected from the accused and those who were like-minded. They would not be protected if a

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A lenient sentence was imposed. Thus, a severe sentence was necessary in order to have a deterrent effect. The accused appealed against the sentences on the ground that in total they were manifestly excessive.

Held, allowing the appeal:

B (1) The High Court judge was correct in his description of the seriousness of the offences and the criminality of the offender. A further serious feature of the offences was the predatory way in which the accused made each victim's acquaintance either through the internet or on the mobile phone (see para 22).

C (2) When considering the appropriate total sentence after pleas for a series of the offences, it is helpful to consider the total sentence which would have been passed after trial to ensure that appropriate credit for any mitigating features has been given. In the instant case, the accused faced a total D sentence in the region of 30 years after trial if he had fought all the counts. Notwithstanding the serious offences involved, a sentence of 20 years' imprisonment would clearly have been excessive (see paras 27 & 29); *Mohammad Noor bin Litoh v Public Prosecutor* [2005] BLR 158 referred.

E (3) The 20 year sentence could not be justified on account of: (i) the youth of the accused; (ii) the clear record of the accused before his first offence in the instant case; and (iii) the accused's immediate confession to each offence when he was arrested. The offences were also not committed with the excessive use of violence and because the accused was known to his F victims, he was easily traced and arrested (see para 30).

(4) The 20 year imprisonment sentence did not give credit for the mitigation and was indeed excessive. To give effect to mitigation, the sentence ought to be reduced to 14 years' imprisonment. The non-cumulative total of 12 strokes of the cane would stand (see paras 31–32).

G **[Bahasa Malaysia summary**

Tertuduh telah mengaku bersalah terhadap empat pertuduhan merogol di Mahkamah Tinggi. Pertuduhan pertama adalah berkaitan dengan rogol keterlaluan di bawah s 376(2) Kanun Hukuman Jenayah (Brunei) ('Kanun'). H Pertuduhan yang selebihnya adalah rogol bertentangan s 376(1) Kanun. Hakim telah menjatuhkan hukuman 10 tahun penjara dan 12 kali sebatan ke atas pertuduhan pertama dan kedua dan lapan tahun penjara beserta empat kali sebatan ke atas pertuduhan ketiga dan keempat. Hukuman bagi pertuduhan pertama dan kedua telah diarahkan berkuat kuasa secara I berturutan dengan satu sama lain dan berturutan dengan hukuman bagi pertuduhan pertama dan kedua. Jumlah hukuman penjara yang dikenakan adalah 20 tahun. Sebatan rotan yang dijadikan tidak kumulatif berjumlah 12 keseluruhannya. Hakim perbicaraan berpendapat bahawa fakta-fakta kes jelas menunjukkan tertuduh merupakan perogol bersiri berbahaya yang

menjadikan wanita muda naif sebagai mangsa dan bahawa pertimbangan paling utama mahkamah hendaklah untuk kepentingan awam. Wanita hendaklah dilindungi daripada tertuduh dan mereka yang berfikiran serupa. Mereka tidak akan dilindungi sekiranya hukuman ringan dikenakan. Oleh itu, hukuman berat adalah perlu untuk memberikan kesan pencegahan. Tertuduh merayu terhadap hukuman atas dasar bahawa secara keseluruhan, hukuman tersebut adalah keterlaluan.

Diputuskan, membenarkan rayuan:

(1) Hakim Mahkamah Tinggi adalah betul dalam menggambarkan keseriusan kesalahan tersebut dan sifat jenayah pesalah. Ciri serius kesalahan tersebut selanjutnya adalah sifat pemangsa di mana tertuduh berkenalan dengan setiap mangsa sama ada melalui internet atau telefon bimbit (lihat perenggan 22).

(2) Apabila mempertimbangkan jumlah hukuman yang bersesuaian selepas pengakuan bagi beberapa siri kesalahan, adalah membantu untuk mempertimbangkan jumlah hukuman yang akan dijatuhkan selepas perbicaraan untuk memastikan pertimbangan bersesuaian telah diberikan terhadap sebarang ciri-ciri mitigasi. Dalam kes ini, tertuduh berdepan dengan jumlah hukuman dalam lingkungan 30 tahun selepas perbicaraan sekiranya dia menentang terhadap kesemua pertuduhan. Meskipun melibatkan kesalahan serius, hukuman sebanyak 20 tahun penjara dengan jelas adalah keterlaluan (lihat perenggan 27 & 29); *Mohammad Noor bin Litoh v Public Prosecutor* [2005] BLR 158 dirujuk.

(3) Hukuman selama 20 tahun tidak dapat dijustifikasikan atas dasar: (i) usia muda tertuduh; (ii) rekod bersih tertuduh sebelum kesalahan pertama dalam kes ini; dan (iii) pengakuan segera tertuduh terhadap setiap kesalahan semasa dia ditangkap. Kesalahan tersebut tidak dilakukan dengan keganasan yang keterlaluan dan oleh kerana tertuduh dikenali oleh mangsa-mangsanya, dia telah dikesan dengan mudah dan ditangkap (lihat perenggan 30).

(4) Hukuman penjara selama 20 tahun tersebut tidak mempertimbangkan mitigasi tersebut dan sememangnya keterlaluan. Jumlah sebatan rotan tidak kumulatif sebanyak 12 kali tersebut adalah kukuh (lihat perenggan 31–32).]

Notes

For cases on appeal against sentence, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3342–3392.

For cases on mitigating factors, see 4 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4263–4267.

For cases on Penal Code (Brunei), see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1229–1259.

For cases on principles of sentencing, see 4 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4289–4311.

Cases referred to

Ibrahim bin Hj Mutsuman v PP (Criminal Appeal No 11 of 2005 and No 1 of 2006); [2006] BLR 227 (refd)
Iswahyudi bin Haji Nurhidayat v PP (Criminal Appeal No 11 of 2009) (refd)
Mohammad Noor bin Litoh v PP [2005] BLR 158 (refd)
PP v Khairul bin Haji Dagang (Criminal Trial No 4 of 2008) (refd)

Legislation referred to

Penal Code (Cap 22) [BR] s 376(1), (2)

Appellant in person.
Aldila Mohd Salleh (Karen Tan with her) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mortimer PCA:

[1] Appearing in front of Steven Chong J on 10 October 2009 the appellant pleaded guilty to four counts of rape. The first count was aggravated rape contrary to s 376(2) of the Penal Code. The remaining three were of rape contrary to s 376(1). The judge passed sentences of ten years imprisonment and 12 strokes on each of counts first and second, and eight years imprisonment with four stokes on each of counts third and fourth. The sentences on counts first and second were ordered to run concurrently making a total ten years imprisonment. On counts third and fourth, five years imprisonment on each was ordered to be consecutive and consecutive with the sentence on counts first and second. The total imposed therefore was 20 years imprisonment. All the strokes were made non-cumulative totalling 12 in all.

[2] The appellant appeals against these sentences on the grounds that in total they are manifestly excessive.

THE FACTS

[3] At the time of trial the appellant was 24 years of age, divorced with two children and unemployed. He had no previous convictions.

[4] The facts are taken from the judgment which recited those admitted by the appellant at trial.

[5] The third count was the first in time. This was committed on 3 June 2008. Miss Y, the victim, was a 14 years old schoolgirl. Having made her acquaintance on the internet the appellant arranged to meet her and her younger brother at a convenience store. At the store he purchased drinks for her and her brother and told her brother to make his way home. He took the girl to a quiet area at the top of a nearby hill. Having refused to sit with him on some wooden planks he stood next to her and removed her lower clothing as well as his own. She became frightened and began to cry but he pinned her hands to the ground and raped her. She screamed in pain and asked him to stop without avail.

[6] When he had finished he put on his clothes and left. She also dressed and walked home. She was too frightened to report the matter immediately but the following day at school it became known that she was in pain and the matter came to light. A report was then made to the police and the appellant was arrested the next day (5 June 2008). He admitted the offence and was released on police bail pending further investigations. He was still on bail when he committed the fourth count on 9 January 2009.

[7] On the fourth charge the victim was Miss Z. She was 20 years of age and the appellant also made her acquaintance on the internet. By this means he knew that she worked at a cafe which he visited on 8 January 2009. There he persuaded her to go out with him. She accompanied him on a bus to his sister's house where they stayed until it became the late. She became worried about getting home and asked him when he would take her back. He replied that his brother was out with the car and it was not available and so persuaded her to stay the night.

[8] The two of them then slept on a mattress. In the early hours of the morning the appellant removed the girl's underclothing and had intercourse with her without her consent. At the time she was frightened and crying. Afterwards she replaced her clothes and the following morning returned home to Bandar Seri Begawan.

[9] Before she left the appellant threatened, if she reported the matter, to come after the girl's boyfriend with a parang. She was frightened and consequently it was five days before a report was made to the police. Again the appellant was arrested. He admitted rape of Miss Z and was again released on police bail for further investigations.

[10] The first and second charges took place on 1 and 2 September 2009. They concern Miss X who was also 20 years of age at the time. She was working as a cashier. The appellant made Miss X's acquaintance playing a game on his mobile phone. It was in the fasting month and on 1 September 2009, in a text

message, he invited her to break fast with him. Miss X finished work at 22:00 hours but she had a rest hour between 17:45 and 19:15 hours so she invited him to meet her at Athirah Plaza. At about 18:30 the appellant arrived in a car driven by his brother. Miss X got in the car expecting to go to Bandar Seri Begawan to break fast. However the car approached Subok so she asked what was happening. The appellant said that he was being dropped off to collect his own car keys from home. They were dropped off near a jetty from which the appellant ferried himself and Miss X to Kg Menunggul arriving at about 19:00 hours. From there they started to walk towards the appellant's house but Miss X became concerned about the time as she was late returning to work. Although he said it was another mile to his house he reassured her by offering to explain the situation to her supervisor. On the basis that he was waiting for his nephew to bring his car keys he took her to a hut where they rested. He tried to touch her but she told him off.

[11] It was 22:00 hours when the defendant told Miss X said he would take her home and they made their way back to the boat. In the middle of the river the appellant asked her to engage in sexual intercourse. She refused saying that if he tried anything she would jump out of the boat. But he grabbed her hands and tied them with a rope and a struggle ensued. In defending herself she managed to kick him and he fell into the bottom of the boat. But he then got up, punched her in the face and overpowered her. She was screaming for help but he mocked her saying no one could hear her. He removed her clothes and raped her.

[12] Afterwards he untied her hands and told her to dress. Instead of continuing to Bandar Seri Begawan he took the boat back to Kg Menunggul and his father's house where she spent the night in his father's bedroom.

[13] Early the following morning the appellant again asked for intercourse with her. When she refused he forced himself upon her again (the second charge). She tried to struggle but was in pain and weak from the previous rape. Afterwards he warned her not to report the matter to the police as if he were imprisoned he would go after her family.

[14] Later the same day he took her to Kianggeh open market from which she took a bus back to her home in Bandar Seri Begawan. By this time she had been reported to the police as a missing person and on arrival home she was taken to the police station to report the rapes. The following day, 3 September 2009, the appellant was arrested at his father's house. He admitted raping Miss X, punching her in the face and tying her hands with a rope.

THE JUDGES REASONS

[15] In assessing the level of sentence on the first count the judge gave weight

to the fact that the appellant was on bail for the rapes of the two earlier victims at the time and the level of violence he had used. On the second charge he noted that this was a repeated act against the same woman and that he had coerced her to stay with him for the night. Also that he threatened her after the rape. On this count he rightly noted that the aggravating factor was the victim's age of only 14 years. On the fourth charge he took into account the threats made to Miss Z after she had been raped which led her not to make a police report for five days.

[16] With these matters in mind he took starting points of 15 years and 15 strokes on counts first and second which he reduced to ten years and 12 strokes for mitigating factors including the pleas of guilty. On counts third and fourth, he took starting points of 12 years and six strokes reduced to eight years and four strokes.

[17] He then considered the totality of the sentence to be passed and drawing on the principles set out in the DA Thomas in his *Principles of Sentencing*, he considered that the overall criminality involved required a total sentence of 20 years imprisonment. He said that the facts of the case clearly showed that the defendant was a dangerous serial rapist who preys on naive young women and that the overriding consideration of the court must be in the public interest. He said women must be protected from the defendant and those who are like-minded and that they would not be protected if the lenient sentence was imposed so a severe sentence was necessary in order to have a deterrent effect. In his view the sentence although severe was neither excessive nor crushing having regard to the overall seriousness of the offences and was fully deserved.

THE APPEAL

[18] In effect the appellant asks for his sentence of 20 years to be reduced on the grounds that in totality it is manifestly excessive.

[19] In *Iswahyudi bin Haji Nurhidayat v Public Prosecutor* (Criminal Appeal No 11 of 2009), we considered a range of sentences (mostly recent) passed in serious rape cases in this jurisdiction, some of which this court has heard on appeal. We concluded at para 20:

> The range of sentencing demonstrated by these cases for rapes with serious aggravating features, although not all charged under s 376(2), demonstrate that the level of sentences imposed after trial are between nine years and 15 years. But, as we have noted the two cases at the top and bottom of this range have exceptional features. In most cases the starting point after trial has been 12 years depending upon the particular facts. This level has been considered by this court.

[20] Madam Aldila, for the public prosecutor, cited a further decision not considered in the above but consistent with the range of sentences demonstrated. This is *Public Prosecutor v Khairul bin Haji Dagang* (Criminal Trial No 4 of 2008) in which a sentence of 14 years with 14 strokes was passed by Hairol Arni J upon an accused after trial for a serious aggravated rape under s 376(2) involving the use of a knife. The accused had a previous conviction for two counts of aggravated rape in 1994.

[21] From this it can be seen that although the sentences of ten years concurrent on counts first and second are high within the appropriate range even for these very serious offences none of the individual sentences passed could be said to be manifestly high. The real issue in this appeal is whether the total of 20 years imprisonment is too severe.

[22] The judge sentenced with commendable care and gave full reasons for his decision. We are in full agreement with his description of the seriousness of the offence and the criminality of the offender. Indeed, a further serious feature of the offences was the predatory way in which the appellant made each victim's acquaintance either through the internet or on the mobile phone.

[23] However, this general description does not resolve the issue as to the appropriate total sentence for the overall criminality of the offences. The judge referred to passages in DA Thomas' *Principles of Sentencing* (2nd Ed) at p 57 in which the author refers to two principles relevant to totality. First, the total may be excessive if it substantially exceeds the normal level of sentence for the most serious of the individual cases involved. Second, he says the sentence must not be 'crushing'. In other words the total should be not be so long as to deprive an accused of any prospect of reformation and resuming a useful life.

[24] The judge also noted that there may be specific reasons for not following these guidelines. The author cites two instances. One in which a total of nine years imprisonment was upheld for three attacks an accused made on his wife in circumstances where he was 'very dangerous' and had a long record of convictions for violence. The second was in which a man of 42 years had many previous convictions for dishonesty and was sentenced to a total of nine years for a series of frauds which began a few weeks after his release from prison. Even though this sentence exceeded the appropriate sentence for the most serious of the individual offences it was 'necessary for the protection of society to keep him in custody for a long time'.

[25] *Ibrahim bin Hj Mutsuman v Public Prosecutor* (Criminal Appeal No 11 of 2005 and No 1 of 2006); [2006] BLR 227 of is one of many cases in which this court has also considered the approach to totality. At p 233 the court said:

> When sentencing for a series of offences a judge must first determine the proper sentence for each offence ... It is imperative that he or she then considers the appropriate total sentence for the overall criminality of all the offences. His or her duty is to ensure that the total is adjusted as to be appropriate but not excessive.

[26] The judge did this and then gave credit for the mitigations in these terms:

> I give full credit to the defendant for pleading guilty to all the charges at the first opportunity which has saved the victims the ordeal of a trial. I also take into account his age and clear record.

[27] As in all sentencing when considering the appropriate total sentence after pleas for a series of the offences it is helpful to consider the total sentence which would have been passed after trial to ensure that appropriate credit for any mitigating features has been given. In *Mohammad Noor bin Litoh v Public Prosecutor* [2005] BLR 158 at p 160G, this court considered the starting point:

> The overall criminality of these offences, including the mitigation does not warrant six years imprisonment, which is, in the circumstances, excessive. Six years imprisonment would involve a starting point of about nine years. The six years imprisonment passed is approximately the level of sentence, which may have been passed after trial.

[28] A starting point after trial assists a sentencer to give appropriate weight to mitigation which can otherwise easily be overlooked when the totality is being assessed for a number of individual serious offences.

[29] Turning to the 20 year sentence in the instant appeal. This would involve a total sentence in the region of 30 years after trial if the appellant had fought all the counts. Even for these serious offences such a sentence would clearly have been excessive.

[30] In these circumstances it is necessary to consider whether a 20 year sentence was nevertheless justified on the grounds that the public must be protected from this dangerous man. Without overlooking the seriousness of the offences in any way the answer must be no for several reasons. First the youth of the appellant, second his clear record before the first offence and third his immediate confession to each offence when he was arrested. Further, these offences were not committed with the use of excessive violence as is sometimes the case and, because his identity was known to each victim, he was easily traced and arrested. In any event the length of sentence inevitably to be imposed will be seriously deterrent and the public will be protected for many

years.

CONCLUSION

[31] The 20 year sentence is within the range which would normally have been passed after trial, indeed high within that range, and it does not give credit for the mitigation as intended by the judge (see para 25 above). The consequence is that the sentence is excessive. In order to give effect to this mitigation we allow the appeal and reduce the total sentence of 20 years to 14 years imprisonment. This is a deterrent sentence, it protects the public, and it reflects the overall criminality of the offences.

[32] We achieve this sentence as follows: on counts first and second, the ten years concurrent sentences stand. On count third, two years of the eight year sentence will be consecutive to the sentence on counts first and second and will otherwise be concurrent. On count four, two years of the eight year sentence will be consecutive to the sentences on counts first, second and third making 14 years in all. The non-cumulative total of 12 strokes will stand.

ORDER

[33] The appeal is allowed against the total sentence of 20 years imprisonment and 12 strokes.

[34] On count first and count second, there will be concurrent sentences of ten years imprisonment with non-cumulative 12 strokes.

[35] On count third, two years of the eight year sentence will be consecutive to the ten years sentence on count first and count second, otherwise will be concurrent. The four strokes will be non-cumulative.

[36] On count four, two years of the eight year sentence will be consecutive to the sentences on counts first, second and third otherwise will be concurrent. The four strokes will be non-cumulative.

[37] The total sentence imposed is 14 years imprisonment and 12 strokes.

Appeal allowed.

Reported by Andrew Christopher Simon